

HARDY AND CAREY, L.L.P.
ATTORNEYS AT LAW
111 VETERANS BOULEVARD
SUITE 255
METAIRIE, LOUISIANA 70005
TELEPHONE: 504-830-4646
TELEFAX 504-830-4659

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NOV 29 1995

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

November 28, 1995

1212-013

Mr. William Caton
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: PETITION FOR RULEMAKING

Dear Mr. Caton:

Enclosed herewith please find an original and four copies of a Petition for Rulemaking filed by our law firm, Hardy and Carey, L.L.P. Also enclosed is an additional copy for date stamping and return in due course along with a self addressed, stamped envelope for your convenience.

Should you have any questions regarding the attached, please feel free to direct them to the undersigned.

Respectfully submitted,


Ashton R. Hardy

ARH/vm

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re)
Amendment of Section 73.3573 (g)(3))
of the Commission's Rules:)
'First Come/First Serve' FM)
Broadcast Application Processing System)

RECEIVED
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

To: Chief
Policy and Rules Division

PETITION FOR RULEMAKING

The law firm of Hardy and Carey, L.L.P., individually and on behalf of its clients, petitions the Commission to amend Section 73:3573 (g)(3) of its Rules (47 CFR 73:3573 (g)(3)) and any related rules, to add the requirement that "the Commission will issue a Public Notice announcing the return or dismissal of all applications filed pursuant to a specific window and the commencement of a fourteen-day waiting period after which, for the first time, first come/first serve applications may be tendered." In support, Hardy and Carey¹ shows as follows:

¹Hardy and Carey represents a number of radio broadcasters and is regularly engaged in notifying these clients of FCC Public Notices which can affect their operation. Hardy and Carey is an "interested person" pursuant to 1.401(a) of the Commission's Rules because it must interpret those rules for its clients and provide appropriate advice.

I. BACKGROUND

By Report and Order, MM-Docket No. 84-750, the Commission replaced the previous FM Broadcast Application procedure with the current combined filing window and "first-come first-serve" procedure. 58 RR 2d 776 (1985). According to the Commission, this change was necessary because the old two-step cut-off system facilitated the submission of anti-competitive and often speculative applications which wasted the Commission's resources and only served to postpone service to the public. Id. at 779. Change was also especially urged because of the expected influx of applications for 689 new FM allocations, which would have surely resulted in a "processing morass." Id. In adopting the new procedure, the Commission stressed its role of striking a balance between the "dual and sometimes divergent goals of selecting the best possible applicant and the commitment to bring new service to the public as expeditiously as possible." Id. at 778.

As set out in the R&O, under the filing window and "first-come, first-serve" procedure, the Commission would announce a one-time, fixed filing "window" governing all applications for vacant commercial FM channels. In the event a window closed and no acceptable applications had been filed during the window period, a "first come/first serve" processing standard would apply, and the first acceptable application received as of the date of the last return or dismissal of all applications would cut off the filing rights of any subsequent applicants. All "first come" applications would be considered as simultaneously filed if filed on the same day. Applications received after the lead application would be grouped behind the lead application in a queue

according to the date of filing. The rights of an applicant in the "queue" would then ripen only upon a finding that the lead application was unacceptable, upon which occurrence the Commission would process applications within the queue until an acceptable application is found. Id. at 785-86.

The FCC adopted but later modified this procedure because it was not fair to all FCFS applicants. First Come/First Serve FM Broadcast Application Processing System; Clarification, 51 Fed. Reg. 23764 (1986). So that all FCFS applicants had an equal opportunity to submit applications, the Commission announced that upon the return or dismissal of all applications filed in a specific window, a public notice would be issued to announce the return or dismissal. That public notice would also announce a seven day waiting period (from the date of the release of the public notice) before any FCFS submissions could be accepted. The Commission justified the adoption of this new seven day release-to-submission waiting period as necessary to ensure the equitable treatment of all potential FCFS applicants (i.e. avoid any advantage to any applicant before all potential applicants knew of the return or dismissal of all applications in the filing window). The commission further stated that the new FCFS prohibition against premature filings would be strictly enforced to ensure the integrity of the FCFS filing system.

Accordingly, under the current FCFS guidelines, it is paramount for an FCFS applicant to submit an acceptable application package on the first day after the seven-day waiting period; otherwise, the application takes a backseat in the queue behind the lead application. Potential applicants or their legal counsel inside or reasonably close

to the Beltway receive notice quickly and barely have ample time to submit an application package on the first day after the seven-day waiting period. However, potential applicants in other parts of the country are effectively prevented from ever achieving "lead application" status because they only receive a 4-day notice, at best, of the announcement of a FCFS FM channel availability due to an inherent mailing delay. Hardy and Carey, as communications counsel, receive the public notices by mail 3-4 days after release and then must notify potentially interested clients of the channel availability. These clients must decide whether to apply and, if they elect to do so, locate a site, prepare an application package and arrange for filing of the package. By the time that a distant applicant has taken these steps, it is highly unlikely that his application package will reach the Pittsburgh bank or the FCC on the first day after the seven-day waiting period. Thus, such applicants are effectively prevented from achieving lead applicant status.

Because strict enforcement of the FCFS public notice procedures unfairly prejudices distant applicants by consistently relegating them to a position in the queue behind the lead applicant, the opportunity for such applicants to successfully acquire vacant FM channels is seriously and unfairly circumscribed. This result is at direct odds with the FCC's purpose in adopting the FCFS public notice procedures -- to ensure that no single FCFS applicant, or group of applicants, gained an unfair advantage over other FCFS applicants by virtue of preemptive submissions.

II. THE EXISTING FCFS PUBLIC NOTICE PROCEDURE IMPAIRS THE PUBLIC INTEREST.

A. The delay in distribution of public notices limits the public's access to programming alternatives by contributing to an inequitable distribution of FM channels.

Bringing "new service to the public as expeditiously as possible" was the driving factor behind the FCC's adoption of the streamlined FM Broadcast Application system. Report and Order, MM Docket No. 84-750 at 778. According to the Commission, the goal of ensuring that "an expansive menu of programming alternatives" were "made rapidly available to the American public" dictated striking the balance in favor of expedient service to the public over "selecting the best possible applicant." Id.

The public interest is not adequately served when the Commission's procedures unfairly tilt the playing field in favor of those in the Washington, D.C area who receive earlier notice than others that the seven-day waiting period has begun to run. In fact, this mailing delay operates to essentially eliminate more distant applicants and their legal counsel from consideration when vacant FM channels are offered on a first come, first serve basis.

This unfair procedure translates into a disservice to the public. While the seven-day waiting period certainly accomplishes the goal of expeditious service, it does so at the expense of the public served by those applicants who cannot possibly submit an acceptable application by the first day after the waiting period. The communities served by clients of Hardy and Carey (and other legal and engineering firms outside the Beltway) who are potential applicants for FCFS FM channels are thus

deprived of equitable access to programming alternatives. The Commission's laudable attempts at efficiency and rapidity of processing applications have the unacceptable side effect of violating the public's interest in equitably distributed FM channels and programming alternatives.

The public also suffers because the FCFS procedural deficiencies frustrate the advantages of common ownership of radio stations. With the FCC's current emphasis on common ownership of radio stations, FCFS FM channels are the subject of special attention. Common ownership of radio stations in a single market greatly benefits the public by allowing cooperative programming, promotion, production, advertising sales and other operations which lower overall operating costs. This savings is passed on to the public in the form of better programming quality and lower advertising rates. See Second Memorandum Opinion and Order, Revision of Radio Rules and Policies, MM Docket No. 91-140 (1994). Without more equitable FCFS public notice procedures, more distant applicants' common ownership goals are frustrated and the public is deprived of common ownership advantages.

Therefore, the current FCFS waiting period procedures impermissibly violate the Commission's stated public interest objectives. The public is better served when all applicants have an equal opportunity to attain vacant FM channels and thereby operate in the best interests of the public.

III. THE PRESENT RULES DO NOT ENSURE FAIRNESS TO ALL POTENTIAL APPLICANTS.

A. The rules permit defacto "premature" applications.

The mailing delays inherent in the current public notice procedures to distant applicants and their legal counsel operate to permit premature FCFS applications by those who do not encounter mailing delays.

In clarifying MM Docket No. 84-750, the Commission adopted the 7-day waiting period to offset the filing of premature applications encouraged by the automatic commencement of the first come/first serve processing system after a filing window had expired. See Clarification, *supra*. The Commission declared that a Public Notice announcing the commencement of a seven-day waiting period would counter any tendency toward premature filing.

However, under the newly adopted waiting period, the distribution of the public notice to distant applicants and their legal counsel is significantly delayed. This delay does not prohibit the filing of an application but practically guarantees that once the application is finally filed, it will be received well after the first business day after the waiting period and therefore placed in the queue behind the lead application. From that position in the queue, the "late" application will only be considered if the lead application is somehow defective.

Thus, from the perspective of a distant applicant who, due to inherent delays, is not ever likely to submit an application in time to attain the status of lead application, those applications which are submitted in time to achieve lead application status become defacto "premature" applications. This prematurity stands in blatant

contravention of the Commission's articulated concerns for fairness which were the impetus for the adoption of the 7-day waiting period.

B. The rules promote the inequitable treatment of all potential FCFS applicants and impugn the integrity of the FCFS system.

The waiting period was adopted so that no one applicant would enjoy an advantage over others in applying for vacant FM channels in the first come/first serve system. The Commission stated that the waiting period would be "strictly enforced" to preserve the "integrity of the first come/first serve filing system and the equitable treatment of all potential . . . applicants." Clarification, *supra* at 23765.

The inherent mailing delays to distant applicants and their legal counsel gut the fairness principles of the waiting period by returning to the pre-waiting period procedures where the first come/first serve system automatically commenced upon the expiration of a filing window. Then, as now, some applicants have the advantage of earlier notice than others of the availability of the FCFS FM channel and can act quickly to ensure their application will be considered over others in the application queue. Under this scheme, the FCFS system loses all integrity and, in effect, promotes the inequitable treatment of FCFS applicants.

Therefore, the Commission's strict enforcement of its FCFS guidelines, rather than protecting all FCFS applicants, prejudices those applicants who receive delayed notice of the station availability. Extending the 7-day waiting period to 14 days would inject an equitable "cushion" into the waiting period so that all FCFS applicants would enjoy equal opportunities to apply for vacant FM channels.

IV. CONCLUSIONS

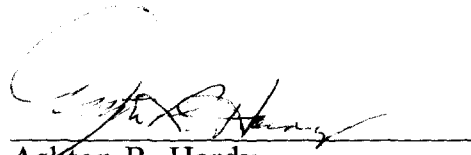
Hardy and Carey submits that the seven-day waiting period embodied in the current FCFS procedures is unfairly prejudicial to applicants and their legal counsel outside of the Washington, D.C. area and impairs the public interest. The extension of the waiting period from seven to fourteen days will remedy the inherent unfairness caused by mailing delays, restore the integrity of the FCFS filing system, and ensure that the interest of the public in an expansive menu of quality programming alternatives is met.

IN VIEW OF THE ABOVE, Hardy and Carey request that the following be added to the language of Section 73:3573 (g)(3):

To ensure fairness to all first come/first serve applicants, the Commission will issue a Public Notice announcing the return or dismissal of all applications filed pursuant to a specific window and the commencement of a fourteen-day waiting period after which, for the first time, first come/first serve applications may be tendered. Applications received prior to the end of the waiting period will not be accepted for tender..

Respectfully Submitted,

By:


Ashton R. Hardy
Michael Lamers
Hardy & Carey, L.L.P.
111 Veterans Boulevard, Ste 255
Metairie, LA 70005
(504) 830-4646